BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EUGENE BROEKEMEIER Claimant VS. **KEIM TRANSPORTATION, INC.** Respondent AND **NATIONAL AMERICAN INSURANCE COMPANY** Insurance Carrier	)	Docket No. 193,352

ORDER

Respondent appeals from a November 9, 1994 Preliminary Hearing Order entered by Administrative Law Judge Floyd V. Palmer, granting claimant's request for temporary total disability compensation and medical benefits.

ISSUES

In its Application for Review, respondent raises two issues:

(1) Whether the evidence establishes that claimant suffered accidental injury;

(2) Whether the injury arose out of and in the course of the claimant's employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

K.S.A. 44-534a confers upon the Appeals Board the authority to review preliminary findings which address the above enumerated issues. Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

(1) Claimant has established by preponderance of the evidence that he suffered personal injury by accident culminating on July 17, 1994, which was his last day of work.

Claimant was employed by respondent as an over-the-road truck driver. About four or five days before July 17, 1994, he delivered a load to Atlanta, Georgia. It was about this time when he first noticed a problem. He described it as being like a lump or a pimple on the inside of his right leg near the groin. It was in the area of his right leg or buttocks that he would sit on when driving.

He initially thought it was just a pimple or something minor, but it got progressively larger, more swollen and painful as he continued to work. He picked up a load in Indianapolis, Indiana, and took it to Mountain Top, Pennsylvania, and by the time he got there it was considerably worse. He decided he needed a physician's help. He picked up a load in Belleville, Pennsylvania, which was going to Gothenburg, Nebraska, which was basically in route to the respondent's shop. He tried to take the load to the shop where he could have someone else deliver it, but his condition got so bad that he was forced to stop at Eagleville, Missouri, where he called to have his son pick him up and take him to the hospital.

Claimant was seen at the emergency room at the local hospital on July 17, 1994. The physician on duty lanced the cyst and sent claimant home with instructions to follow-up with his doctor the next day. When claimant was seen the following day, he was immediately admitted to the hospital and emergency surgery was performed. The area of the cyst and a much larger surrounding area was involved with gangrene poisoning. This was described as a life-threatening situation. Tissue was removed in the scrotum area, left and right sides; claimant lost one of his testicles; also, various tissue within the bottom of the groin area, scrotum and perineal areas was removed. He was in the hospital three weeks and had three separate surgeries during that time.

Claimant bears the burden of proof to establish his claim. "Burden of proof" is defined in K.S.A. 44-508(g) as ". . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

> ". . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

In order to recover, the claimant must establish he has sustained a personal injury by accident arising out of and in the course of his employment. K.S.A. 44-501(a). "Personal injury" is defined in K.S.A. 44-508(e) as:

> ". . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living."

The terms "injury" and "accident" are not synonymous. Each must be established by the claimant. An "accident" is ". . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force." K.S.A. 44-508(d). An accident is an event which causes an injury. The injury is a change in the physical structure of the body which occurs as a result of the accident. Barke v. Archer Daniels Midland Co., 223 Kan. 313, 317, 573 P. 2d 1025 (1978).

The Kansas Supreme Court has ruled that it is not necessary for the injury to be caused by trauma or some form of physical force to be compensable. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 379, 573 P.2d 1036 (1978). Personal injury or

injury results from an accident which can occur in a single event or from a series of events which occur over time. The event or events do not have to be traumatic or manifested by force. Rather, an accident can occur when, as a result of performing his or her usual tasks in their usual manner, the employee suffers an injury. Downes v. IBP, Inc., 10 Kan. App. 2d 39, 41, 691 P.2d 42 (1984), rev. denied 236 Kan. 875 (1985).

The evidence in this case supports a finding of personal injury by accident on the date alleged.

(2) Accidental injury arose out of and in the course of the claimant's employment.

The claimant must establish that he has sustained an accident and injury arising out of the employment and in the course of the employment. These are separate elements which must be proven in order for the claim to be compensable. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973). In order to establish that the incident "arose out of the employment", the claimant must show that there is some causal connection between the accident, injury and the employment. To do this, it must be shown that the injury arose out of the nature, conditions, obligations and incidents of the employment. Only risks associated with the work place are compensable. "In the course of the employment", relates to the time, place and circumstances under which the accident occurred, and that the injury happened while the employee was at work at his or her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

Claimant testified that he first noticed his condition while performing his job duties as an over-the-road truck driver. Once the condition started, it was aggravated by driving. He testified that if he rested awhile, it would seem to get a little better to the point that he was able to continue driving but it would then get progressively worse. Riding down the road, bouncing, caused swelling and pain to the point where he could not continue driving.

Claimant has had diabetes since the late 1980s. The doctors have told him that the diabetes may have been a factor in this condition, but they did not say that it was the cause of the cyst and infection. Dr. Mark Brandsted, the treating neurologist, stated that claimant went from having a perirectal abscess to developing a full blown Fournier's scrotal gangrene or necrotizing fascitis which, in his opinion, was at the very least aggravated by claimant's employment as a truck driver.

It is well settled in this State that an accidental injury is compensable where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction. Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984). Demars v. Rickel Manufacturing Corporation, *supra*; Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

Having found based upon the evidence in the record as it now exists that claimant has met his burden of proving accidental injury on July 17, 1994, and that said injury arose out of and in the course of his employment with respondent, the Order of the Administrative Law Judge is affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the November 9, 1994 Preliminary Hearing Order of Administrative Law Judge Floyd V. Palmer should be, and is hereby, affirmed and remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Larry T. Hughes, Attorney at Law, Topeka, KS
Brian J. Fowler, Attorney at Law, Kansas City, MO
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director